UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

CSX TRANSPORTATION, INC., *et al.*	)	
Plaintiffs,	)	
v.	)	Civil Action No. 05-0338 (EGS)
ANTHONY A. WILLIAMS, *et al*.,	)	
Defendants.	)	

THE DISTRICT'S MOTION FOR SUMMARY JUDGMENT

Pursuant to Fed. R. Civ. P. 56(b) and LCvR 56.1, defendants District of Columbia and Anthony A. Williams (collectively, "the District") hereby move this Honorable Court for summary judgment on the Second Supplemental Complaint.

The grounds and the reasons are set forth more fully in the accompanying Memorandum of Points and Authorities and proposed Order. As required by LCvR 56.1, a Statement of Material Facts As to Which There is No Genuine Issue has been provided.

DATE: October 27, 2006

Respectfully submitted,

ROBERT J. SPAGNOLETTI
Attorney General for the District of Columbia

GEORGE C. VALENTINE
Deputy Attorney General
Civil Litigation Division

/s/ Robert Utiger
ROBERT UTIGER, D.C. Bar No. 437130
Senior Assistant Attorney General
Civil Litigation Division
Office of the Attorney General for the District of Columbia

441 Fourth Street, N.W., 6th Floor South
Washington, D.C. 20001
Telephone: (202) 724-6532
Facsimile: (202) 727-3625

/s/ Richard S. Love
RICHARD S. LOVE, D.C. Bar No. 340455
Chief, Equity I Section
Office of the Attorney General for the District of Columbia
441 Fourth Street, N.W., 6th Floor South
Washington, D.C. 20001
Telephone: (202) 724-6635
Facsimile: (202) 727-0431

/s/ Andrew J. Saindon
ANDREW J. SAINDON, D.C. Bar No. 456987
Assistant Attorney General
Equity 1 Section
441 Fourth Street, N.W., 6th Floor South
Washington, D.C. 20001
Telephone: (202) 724-6643
Facsimile: (202) 727-0431

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MEMORANDUM OF POINTS AND AUTHORITIES
IN SUPPORT OF
DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

Defendants the District of Columbia and Anthony A. Williams (collectively, "the District") pursuant to Fed. R. Civ. P. 12(b)(6) and 56(b), have moved this Court for summary judgment on the Second Supplemental Complaint. This memorandum of points and authorities is provided in support of the defendants' dispositive motion in accordance with LCvR 7(a). As required by LCvR 56.1, a Statement of Material Facts As to Which There is No Genuine Issue ("SMF") has also been provided.

The District files contemporaneously herewith its Opposition to Plaintiff CSXT's Motion for Summary Judgment, which is incorporated by reference here.

Summary judgment must be granted to the District. The District's Terrorism Prevention Act is not preempted by federal law. The plain terms of the sole regulation put forth by plaintiffs as "covering the subject matter" of rerouting hazardous materials to prevent terrorist attacks manifestly does *not* address that topic. Moreover, extensive discovery has not disclosed any facts to the contrary.

Indeed, not only did discovery reveal an utter lack of consideration (or, as plaintiffs claim, an outright "rejection") of rerouting, it showed that the United States is actively planning further steps to govern rerouting in these situations—by itself an implicit admission that HM-232 does not currently "cover the subject matter."

Defendants here do not challenge the *adequacy* of the federal efforts, but the scope of HM-232, and whether that single regulation preempts because it "covers the subject matter" of the District law.

After the attacks of 9/11, Congress updated federal law and expressly authorized the states to "fill the gaps" in federal regulation, which is all the Terrorism Prevention Act does.

Now that discovery had been completed, there are *no* material facts at issue which may impede a decision on the straight-forward legal questions in dispute.

I. Factual and Procedural Background

The facts of this matter have been laid out in the parties' previous filings and will not be repeated here except where relevant.

In a decision dated May 3, 2005, the United States Court of Appeals for the District of Columbia Circuit reversed this Court's denial of a preliminary injunction, and remanded with directions to enter a preliminary injunction prohibiting enforcement of the Emergency Act. *CSX Transp., Inc. v. Williams*, 406 F.3d 667, 674 (2005) (*per curiam*) ("*CSX*"). The Circuit expressly declined to address CSXT's claims under Hazardous Materials Transportation Act ("HMTA"), 49 U.S.C. §§ 5101–5127, the Interstate Commerce Commission Termination Act of 1995 ("ICCTA"), *codified as amended at* 49 U.S.C. §§ 701 *et seq*. (2005), or the Commerce Clause. *CSX*, 406 F.3d at 669 n.3.

By Order of September 27, 2005, the Court directed the United States here to produce all non-privileged documents and information likely to lead to the discovery of admissible evidence relating to "1) Whether the federal government has prescribed a regulation or issued an order covering the subject matter of the State requirement within the meaning of the FRSA; and 2) Whether the State requirement is incompatible with a law, regulation, or order of the United States Government." Order at 2. *See* Federal Railroad Safety Act ("FRSA"), *codified as amended at* 49 U.S.C. §§ 20101 *et seq*. (2005).

The permanent version of the legislation in dispute here, the Terrorism Prevention in Hazardous Materials Transportation Act of 2006 ("Terrorism Prevention Act"), D.C. Law 16-80, *see* 52 D.C. Reg. 1047 (Feb. 17, 2006), was transmitted to Congress for review on or about February 6, 2006.[1] 152 CONG. REC. H221-06; S862-02 (Feb. 8, 2006). Congress raised no objection to the Terrorism Prevention Act during its mandated 30-day period of review, and the law became effective on April 4, 2006. *See* 53 D.C. Reg. 3339 (Apr. 28, 2006).

After several months of contentious haggling over the scope of discovery, plaintiffs finally responded to the defendants' requests, producing documents and answering interrogatories and requests for admission.

By letter dated June 9, 2006, CSXT admitted that "[n]o documents relating to communications to or from the federal government representatives with respect to federal authority and decisions on the rerouting of hazardous materials by rail were found" regarding

[1] Because there are no substantive differences among the emergency, temporary, and permanent versions of the Terrorism Prevention Act, the District will not further distinguish between them unless relevant. *See* Second Supplemental Complaint ¶ 5.

CSXT's voluntary North/South rerouting around the District in 2004. District's Exhibit No. ("DCEx.") 1 (copy of letter).[2]

On August 11, 2006, the United States served its Response to Defendant-Intervenor Sierra Club's First Set of Requests for Admission and Supplemental Interrogatory (copy attached as DCEx. 2). On September 8, 2006, the United States served its Supplemental Response and a Supplemental Production of Documents.

Those documents revealed that, on or about March 30, 2006, the United States, through the Department of Homeland Security ("DHS") and the federal Department of Transportation ("DOT"), issued a draft document entitled "Recommended Security Action Items for the Rail Transportation of Toxic Inhalation Hazard [TIH] Materials" to "the industry" for comment. *See* DCEx. 4 at GOV03001, GOV02994–02998. The second sentence of that document stated "All measures are voluntary." *id*. at GOV02994. The 30 recommended "Action Items" included:

> 24. Expedite the movement of trains transporting rail cars containing TIH materials. Minimize the delays in the movement of these cars at shipper and receiver facilities, in transit, and at interchanges between carriers. If practicable, *provide routing of these trains to minimize stops near critical assets within high threat and/or high risk areas*.
>
> * * *
>
> 30. *Routes should be evaluated* (considering factors such as total population exposure, distance traveled, threats, condition of track, and emergency response capabilities) to identify ways to reduce system safety and *security risks*.

Id., GOV 02997–98 (emphasis added).

[2] While it appears that the United States disagreed with CSXT, and asserted that it had found some four (4) pages of communications, *see* DCEx. 2 at 29, a review of those pages (GOV00343–46 (copy attached as DCEx. 3)) reveals that they are only e-mails sent by CSXT to Maryland, Virginia, and federal officials in February of 2005, complaining of the District's legislation, with no mention of the voluntary rerouting.

By letter dated May 5, 2006, two industry groups presented their comments on the Action Items to the Federal Railroad Administration ("FRA") and the Transportation Security Administration ("TSA") (excerpt attached as DCEx. 5, at GOV02978). They stated: "[We] understand that in addition to these draft security action items, also under consideration are . . . a notice of proposed rulemaking concerning routing and storage of TIH materials . . . ." *Id*., and GOV02992 ("[We] understand that a detailed rulemaking proceeding addressing routing is forthcoming.").

"On May 10, 2006, DHS and DOT met with representatives of the freight rail industry to discuss their input and refine the Security Action Items to enhance their effectiveness." DCEx. 4 at GOV03006.

By letter dated May 31, 2006, the FRA notified industry representatives and federal officials of an upcoming conference "to discuss ways to minimize security and safety risks flowing from the transportation by rail of toxic inhalation hazard materials." DCEx. 6 at GOV02895.[3] That letter also noted that "[r]erouting arrangements and market and product swaps are subjects identified for consideration in this process." *Id*. at GOV02899.

A revised list of Action Items was issued on May 22, 2006, and continued to note that "[a]doption of these measures is voluntary." DCEx. 6 at GOV03003. This revised document

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[3] Pursuant to 49 U.S.C. § 333, the Secretary of DOT, "[w]hen requested by a rail carrier, [may] hold conferences on and mediate disputes resulting from a proposed unification or coordination project." 49 U.S.C. § 333(d)(1).

The referenced conference was requested by two industry groups on or about November 10, 2005. DCEx. 6 at GOV02895. The Secretary granted the requested conference to "assist private sector stakeholders in discussing ways to mitigate the security and safety risks inherent in TIH transport with the benefit of antitrust immunity . . . ." DCEx. 7 at GOV01191. Although the law authorizes the Secretary to invite, in addition to industry representatives and federal officials, "[s]tate and local government officials . . . and consumer representatives," 49 U.S.C. § 333(d)(1)(D), he did not do so here. *See* DCEx. 6 at GOV02896–98.

included: "23. Consider alternative routes when they are economically practicable and result in reduced overall safety and security risks." *Id*. at GOV03005.

The May 22, 2006, document also included a "Discussion Document" from the May 10 meeting. That document identified "Key Issues" including "Routing Criteria," specifically: "Current *industry routing plans* take into account safety, but *not necessarily security*, for hazmats. [G]overnment tools *under development* will integrate safety *and security methods for hazmat routes*. *[P]ending* Rulemakings (232) and conferences (333) *deal with hazmat routing security*. *Id*. at GOV03011, 03014 (emphasis added).[4]

DOT is planning to issue a Notice of Proposed Rulemaking ("NPRM"), for a "Rail routing rule," on December 26, 2006, which rule "may require rail carriers" to, *inter alia*, "assess alternative routing options and make routing decisions based on those assessments . . . ." *Report on DOT Significant Rulemakings* (available at http://regs.dot.gov/rulemakings/200609/phmsa.htm?type=#82).[5]

II. Argument

HM-232, by its plain terms, does not "cover the subject matter" of routing of hazardous materials by rail. Moreover, discovery revealed extensive evidence of further discussion and

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[4] The parenthetical numbers apparently reference the ongoing HM-232 rulemaking, and 49 U.S.C. § 333.

[5] It is not entirely clear that there was ever a definitive statement that HM-232 was incomplete or inadequate, or when "routing" explicitly became a topic to be addressed by the upcoming rule, but evidence suggests that such decisions occurred no later than Spring of 2005. *See* DCEx. 8 (United States Supplemental Privilege Log), at 44 (Doc. No. 324, dated 5/13/05, "New Direction for TIH Project," Explanation: "Redirecting TIH project to focus on PHMSA RM revising its security plan rule.); *id*. at 32 (Doc. No. 260, dated 8/29/05, "TIH rulemaking briefing," Explanation: "[P]redecisional discussion of TIH rulemaking . . . on the proper roles of DOT and DHS in issuing a proposed rule on assessment of risks in rail transportation of TIH materials."); *id*. at 11 (Doc. No. 47a, dated 5/27/05, "Outline of NPRM to Amend PHMSA's Security Plan and Training rules to Address General Issues and TIH Route Security").

consideration (and an imminent NPRM) concerning rerouting, an implicit *admission* that HM-232 does not have the preemptive scope asserted.

Congress' Inaction

CSXT claims that "congressional inaction during the brief layover period does not signal congressional approval of District legislation." P.Mem.SJ at 14. But by the Home Rule Act's very terms, unless Congress takes some action to disapprove District legislation during its mandated 30-day layover period, the legislation becomes law. *See* D.C. Official Code § 1-206.02(c)(1) (2005 Supp.). In other words, District legislation is not "disapproved" unless Congress affirmatively acts to do so, so Congress' inaction must have *some* implications.

Obviously, congressional inaction is not equivalent to federal "ratification" of District law, but plaintiffs have failed to cite any precedent for the proposition that Congress' failure to exercise its legislative prerogative over the District is entitled to no weight whatever. Such inaction here in the specific context of the Home Rule Act surely has some significance, as it is one of only two methods of congressional control over the District pursuant to the Constitution (the other being direct legislation).

Moreover, while a resolution attempting to invalidate the emergency and temporary versions of the Terrorism Prevention Act was introduced shortly after the onset of this litigation (but never made it out of committee; *see* n.6, *infra*), similar actions concerning the permanent version of the legislation did not occur.

Unlike the States, the "unique feature" of the legislative process in the District is that, with some exceptions irrelevant here, legislation duly enacted by the District may not take effect

until approved by Congress. *See Atkinson v. D.C. Bd. of Elections & Ethics*, 597 A.2d 863, 864 (D.C. 1991).

Article I, section 8, clause 17 of the Constitution empowers Congress to exercise exclusive legislative authority over the District of Columbia. *See, generally*, *Bliley v. Kelly*, 23 F.3d 507, 508 (D.C. Cir. 1994). In 1973, Congress delegated most of this authority to the District by passing the Home Rule Act, Pub. L. No. 93-198, *codified at* D.C. Official Code §§ 1-201.01 *et seq*. (2005 Supp.). The Home Rule Act allows Congress a 30-day period to review legislation enacted by the District. If Congress fails to pass a joint resolution of disapproval within that period, the legislation becomes law. *Id*. Congress therefore always maintains final control over all legislation adopted for the District of Columbia. *Seegars v. Ashcroft*, 297 F.Supp.2d 201, 237 (D.D.C. 2004).

Because of Congress' continuing and dominant role in District affairs, courts "must be cautious in assessing the validity of the District of Columbia's statutes being challenged, as they are not only the product of the District of Columbia Council, but also congressional approval." *Id*. at 215 (*citing Martin Tractor Co. v. FEC*, 627 F.2d 375, 380 (D.C. Cir. 1980)). *See also New Motor Vehicle Bd. of California v. Orrin W. Fox Co.*, 434 U.S. 1345, 1351 (1977) (Rehnquist, J., in chambers) ("[A]ny time a State [or local government] is enjoined by a court from effectuating statutes enacted by the representatives of its people, it suffers a form of irreparable injury.").

Congress has historically not been reticent to intervene in District affairs. *See, e.g.*, *Bliley*, 23 F.3d at 509 (D.C. legislation making manufacturers of assault weapons strictly liable "met with immediate opposition in Congress;" resolution of disapproval introduced seven days after transmittal to Congress).

In light of the above, and the extremely high-profile nature of the issue generally, and the District's legislation specifically, Congress' utter silence during the mandated review period of the Terrorism Prevention Act is significant.[6]

Summary judgment "shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c). A "complete failure of proof concerning an essential element of the non-moving party's case necessarily renders other facts immaterial." *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986).

Moreover, while the court "must assume the truth of all statements proffered by the party opposing summary judgment," it need not consider wholly conclusory statements for which no supporting evidence is offered. *Greene v. Dalton*, 164 F.3d 671, 674–75 (D.C. Cir. 1999).

It is insufficient, to avoid summary judgment, that some factual issues remain in the case; an issue must be both *genuine* and *material* to preclude the entry of summary judgment. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247–248 (1986).

What Discovery Revealed

Request for Admission number 7 stated "The HM-232 Administrative Record does not contain or reflect any analysis by the United States concerning the use of mandatory rerouting as a means of reducing the risk of, or harm resulting from, terrorist attacks on ultrahazardous

[6] H.R. 2057 was introduced "to prevent the Terrorism Prevention in Hazardous Materials Transportation Emergency Act of 2005 and the Terrorism Prevention in Hazardous Materials Transportation Temporary Act of 2005, as passed by the Council of the District of Columbia, from taking effect . . . ." 151 Cong. Rec. H2879-01 (May 3, 2005). The resolution has never left the House Committee on Government Reform.

materials transported by rail." *See* DCEx. 2 at 9. While the United States' response was "Denied," it continues to maintain that the term "en route security" encompasses rerouting. *Id*. at 9–12. Logically, however, it cannot. Moreover, while the request sought information on *mandatory* rerouting, the United States quoted the NPRM, which indicated that the proposed security plans "*may* include one or more of the following elements, as appropriate . . . . (4) Identification of preferred and alternative routing . . . ." *Id*. at 10 (quoting 67 Fed. Reg. 22,035). Consequently, the United States' evasive denial here must be considered an admission.

Similarly, Request for Admission number 9 stated "The HM-232 Administrative Record does not contain or reflect any analysis by the United States of any adverse consequences that could result if mandatory rerouting was a requirement under HM-232." But the United States' response does not reveal "any analysis," as requested, but merely consideration of the comments of industry, which DOT appears to have swallowed hook, line, and sinker. *See id*. at 13–15. The United States notes that it "addressed comments" on mandatory rerouting, but discovery clearly reveals that that phrase means only that the United States "recapped" those comments here. The United States cannot reasonably maintain that it conducted the independent *analysis* referenced. *Receiving* comments on the speculative harms feared regarding mandatory rerouting is not the same as actually *analyzing* the issue.

Moreover, Request for Admission number 14 stated "The HM-232 Administrative Record does not contain or reflect any analysis by the United States concerning the comparative risks, benefits or effectiveness of imposing *mandatory* security requirements versus adopting a flexible approach that gives transporters discretion with respect to security measures." *Id*. at 20 (emphasis added). Again, while the United States' response was "Denied," the only "evidence" it

points to in the record reveals that the security plan requirements were proposed from the beginning to be *voluntary*. *See id.* at 20.

The United States has admitted that it has not required any rail carrier to either add or remove hazmat routing provisions from its security plan, although it "might" have discussed the issue. *Id*. at 27. Similarly, the United States did not object to CSXT's voluntary rerouting, nor was CSXT required to seek the United States' approval prior to that rerouting. *Id*. at 28–29.

The Terrorism Prevention Act is Not Preempted by Federal Law.

Where federal and non-federal laws overlap, the proper judicial approach is to reconcile the statutory schemes rather than hold one completely ineffectual. *See, e.g., Exxon Corp. v. Governor of Maryland*, 437 U.S. 117, 132 (1978) (Supreme Court "generally reluctant to infer preemption" and it would be "particularly inappropriate to do so in this case because the basic purposes of the state statute and the [federal act] are similar."). *Cf. Ayotte v. Planned Parenthood of N. New England*, ___ U.S. ___, 126 S.Ct. 961, 967 (2006) (courts "should not nullify more of a legislature's work than is necessary, for . . . a ruling of unconstitutionality frustrates the intent of the elected representative of the people.") (citation omitted).

Here, however, CSXT's and the United States' interpretation of federal law would eviscerate the Terrorism Prevention Act. *Cf. New York Dept. of Soc. Servs. v. Dublino*, 413 U.S. 405, 421 (1973) (where "coordinate state and federal efforts exist within a complimentary administrative framework, and in the pursuit of common purposes, the case for federal pre-emption becomes a less persuasive one.").

Because the law has not yet been enforced, plaintiff here brings a facial challenge to the Terrorism Prevention Act. A facial challenge to a legislative act is "the most difficult challenge

to mount successfully, since the challenger must establish that no set of circumstances exists under which the Act would be valid." *United States v. Salerno*, 481 U.S. 739, 745 (1987). "The existence of a hypothetical or potential conflict is insufficient to warrant the preemption of the state statute." *Rice v. Norman Williams Co.*, 458 U.S. 654, 659 (1982). *See also Steffan v. Perry,* 41 F.3d 677, 693 (D.C. Cir. 1994) (*en banc*); *Chemical Waste Management, Inc. v. U.S. Environmental Protection Agency*, 56 F.3d 1434, 1437 (D.C. Cir. 1995).

The historic police powers of the States are not to be preempted by federal law "unless that was the clear and manifest purpose of Congress." *New York State Conference of Blue Cross & Blue Shield Plans v. Travelers Ins. Co.*, 514 U.S. 645, 655 (1995) (internal quotation marks omitted). Not only is that "clear and manifest purpose" missing here, but Congress affirmatively amended federal law in the wake of the 9/11 terrorist attacks to explicitly authorize the action taken by the District here.

CSXT asserts that this presumption against preemption does not apply in an area "where there has been a history of significant federal presence." P.Mem.SJ at 13 (*quoting United States v. Locke*, 529 U.S. 89, 108 (2001)).

Even assuming CSXT is correct, the Supreme Court in *Locke* said it must still determine whether state laws were "consistent with the federal regulatory structure" in light of that scheme's stated objective of national uniformity. *Locke*, 529 U.S. at 108. Here, as discussed in greater detail *infra*, the Terrorism Prevention Act is fully "consistent" with the HMTA and the other federal statutes cited by plaintiff. Finally, the *Locke* Court noted that the *Ray* Court, under longstanding "field" preemption analysis, held that Washington State's regulations were preempted because "Congress . . . mandated federal rules on the subjects or matters there specified, demanding uniformity." *Id*. at 110 (*citing Ray v. Atlantic Richfield Co.*, 435 U.S. 151,

168 (1978)). As the Supreme Court has recently observed, the fact that federal law may preempt state law "says nothing about the *scope* of that pre-emption." *Bates v. Dow Agrosciences LLC*, 544 U.S. 431, 443–44 (2005) (emphasis in original).

The *Locke* Court noted that, to determine the scope of field preemption, it is "useful to consider the type of regulations the [federal agency] has actually promulgated under the [federal statute], as well as the [statute]'s list of specific types of regulations that must be included." *Locke*, 529 U.S. at 112.

Moreover, as this Court has noted, the Supreme Court has already held that a presumption *against* federal preemption is embodied in the savings clauses of the FRSA. Order of Apr. 18, 2005, at 20 n.5 (citing *Tyrrell v. Norfolk Southern Ry. Co.*, 248 F.3d 517, 524 (6th Cir. 2001) (citing *CSX Transportation v. Easterwood*, 507 U.S. 658, 665, 668 (1993)).

In all preemption cases, "the purpose of Congress is the ultimate touchstone." *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 485 (1996); *Geier v. American Honda Motor Co., Inc.*, 166 F.3d 1236, 1237 (D.C. Cir. 1999). If the federal statute in question contains an explicit preemption clause, courts "must in the first instance focus on the plain wording of the clause, which necessarily contains the best evidence of Congress' pre-emptive intent." *Sprietsma v. Mercury Marine*, 537 U.S. 51, 62–63 (2002) (unanimous decision) (quoting *Easterwood*, 507 U.S. at 664).

Here, the "expressed intent" of Congress, in the federal laws cited by plaintiff, despite explicit preemption provisions, is to continue to allow non-federal authorities to act in certain situations. *See City of Columbus v. Ours Garage & Wrecker Svc., Inc.*, 536 U.S. 424, 439 (2002) (the "clear purpose" of Congress in law, despite express preemption of some state authority, is to "'not restrict' the preexisting and traditional state police power over safety.").

The single page text of HM-232, detailing the textual amendments to the existing regulations, does not contain the words "routing," "preempt," or "preemption." 68 Fed. Reg. 14,510, at 14,521 (Mar. 25, 2003). Indeed, while the term "en route security" is used only twice, it is never explicitly defined or described. HM-232 clearly "does not refer to routing restrictions . . . ." *CSX*, 406 F.3d at 671.

"That silence is understandable given the structure and limitations of federalism, which allows the States "'great latitude under their police powers to legislate as to the protection of the lives, limbs, health, comfort, and quiet of all persons.'" *Gonzalez v. Oregon*, ___ U.S. ___, 126 S.Ct. 904, 923 (2006) (quoting *Medtronic, Inc.*, 518 U.S. at 475 (quoting *Metropolitan Life Ins. Co. v. Massachusetts*, 471 U.S. 724, 756 (1985)).[7]

Although Congress itself can directly preempt state law, "a federal agency may pre-empt state law only when and if it is acting within the scope of its congressionally delegated authority[,] . . . [for] an agency literally has no power to act, let alone pre-empt the validly enacted legislation of a sovereign State, unless and until Congress confers power upon it." *New York v. FERC*, 535 U.S. 1, 18 (2002) (quoting *Louisiana Pub. Serv. Comm'n v. FCC*, 476 U.S. 355, 374 (1986)).

When Congress amended the FRSA in 2002 in response to the 9/11 attacks, it made applicable two explicit savings clauses that authorize States to prescribe railroad security measures. *See* Homeland Security Act of 2002, Pub. L. 107-296, §§ 1710–11 (116 Stat. 2135 (Nov. 25, 2002)).

[7] *See also id*. at 924 ("In the face of the [law]'s silence on the [issue] generally and its recognition of state regulation . . . it is difficult to defend the Attorney General's declaration [of preemption].").

The fact that DOT has since promulgated a single regulation purporting (*post hoc*) to cover the subject matter—alone—cannot override Congress' clear intent to preserve state authority over such matters. Here, the District is simply filling in an explicit gap left by Congress. States can so act even where Congress has *not* purposefully left such a gap. *See, e.g., Auction Co. of Am. v. FDIC*, 132 F.3d 746, 749 (D.C. Cir. 1997) ("State law will generally fill the gaps in a comprehensive federal statutory scheme . . . .").

Other circuits have reached identical conclusions. *See Union Pacific Railroad Co. v. California Public Utilities Comm.*, 346 F.3d 851, 868 (9th Cir. 2003) ("Because the FRA merely *deferred* making a rule, rather than determining that *no regulation was necessary*, the state can legitimately seek to fill this gap.") (emphasis added), *cert. denied*, 540 U.S. 1104 (2004); *Drake v. Laboratory Corp. of Am. Holdings*, 458 F.3d 48, 64 (2nd Cir. 2006) ("When states provide remedies for violations of [federal agency] regulations, they are in effect responding to the [law's] express invitation to fill the gaps in its deliberately incomplete remedial scheme.").

Here, the Terrorism Prevention Act is no more than a response to Congress' express invitation to fill the gaps in the amended FRSA's incomplete remedial scheme, as subsequently embodied by HM-232.

A. *The Terrorism Prevention Act is Not Preempted by the FRSA.*

Federal law was updated in light of the terrorist incidents of 9/11; Congress explicitly authorized states to act where the federal government has not yet acted, and allowed states to impose more stringent laws in certain circumstances:

> A State may adopt or continue in force a law, regulation, or order related to railroad safety or security *until* the Secretary of Transportation (with respect to railroad *safety* matters), or the *Secretary of Homeland Security* (with respect to

> railroad *security* matters), *prescribes a regulation or issues an order covering the subject matter* of the State requirement.

49 U.S.C. § 20106 (emphasis added).[8]

The FRSA, by its plain terms, does not preempt State regulation unless the United States issues regulations "covering the subject matter." *Id*. at 49 U.S.C. § 20106. *See also CSX*, 406 F.3d at 670.

In FRSA's second savings clause, Congress expressly authorized States to

> . . . adopt or continue in force *an additional or more stringent law*, regulation, or order related to *railroad* safety or *security* when the law, regulation, or order—
> (1) is necessary to eliminate or reduce an essentially local safety or security hazard;
> (2) is not incompatible with a law, regulation, or order of the United States Government; and
> (3) does not unreasonably burden interstate commerce.

49 U.S.C. at § 20106 (emphasis added). *See also CSX*, 406 F.3d at 671.

1. HM-232 Does Not "Cover the Subject Matter" of the Terrorism Prevention Act.

The crux of CSXT's and the United States' argument here is that HM-232 "covers the subject matter" of the Terrorism Prevention Act.

In the post-9/11 amendments to the FRSA, Congress authorized DOT to regulate railroad safety and DHS to regulate railroad security, and expressly authorized States to "fill the gap" left by federal regulation. Here, leaving aside the wisdom or propriety of DOT's choice—through HM-232—to delegate *its own* power to the railroads themselves, the logical conclusion of plaintiffs' arguments is that those same railroads have filled the regulatory gap left by Congress to the States.

Such a result cannot be justified. *See Louisiana Pub. Serv.*, 476 U.S. at 374–75 ("An agency may not confer power on itself. To permit an agency to expand its power in the face of a congressional limitation on its jurisdiction would be to grant to the agency the power to override Congress. This we are both unwilling and unable to do.").

Notwithstanding this fact, HM-232 does *not* "cover the subject matter" of the Terrorism Prevention Act, because it does not impose any substantive standards on railroads.

The FRSA's "covering" preemption provision must be narrowly construed, and does not extend to federal regulations that merely address the same general subject matter; the federal regulation must "substantially subsume" the subject matter. *Easterwood*, 507 U.S. at 664 (1993); *Norfolk Southern Railway Co. v. Shanklin*, 529 U.S. 344, 352 (2000) ("for preemption to lie under the FRSA, both state and federal law must 'cover' the same subject matter."); *Drake*, 458 F.3d at 60 "[W]ith the FRSA, proponents of preemption must establish more than some relationship between the areas of state and federal regulation in order to prevail. The intersection between the two must be substantial.").

The Supreme Court found that while other statutes' use of the terms "touch upon" or "relating to" confer *broad* preemptive effect, the word "covering" as used in FRSA does *not*, because it is a "more restrictive term" that "displays considerable solicitude for state law in that [FRSA's] express preemption clause is both prefaced and succeeded by express savings clauses." *Easterwood*, 507 U.S. at 664–65 (citations omitted). "FRSA preemption is even more disfavored than preemption generally." *United Transportation Union v. Foster*, 205 F.3d 851, 860 (5th Cir. 2000).

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[8] As noted previously, HM-232 was promulgated by DOT, *not* DHS, and hence the FRSA does not—on its face—preempt the Terrorism Prevention Act, even assuming HM-232 "covers the subject matter" here.

> When applying FRSA preemption, the [Supreme] Court eschews broad categories such as "railroad safety," focusing instead on the *specific subject matter contained in the federal regulation*. In sum, when deciding whether the FRSA preempts state laws designed to improve railroad safety, we interpret the relevant federal regulations *narrowly* to ensure that the careful balance that Congress has struck between state and federal regulatory authority is not *improperly disrupted* in favor of the federal government.

Id. at 860 (emphasis added) (*citing Easterwood*, 507 U.S. at 665–75).

Easterwood and its progeny illustrate these principles. There, in a wrongful-death action, plaintiff asserted that the railroad was negligent under state law for operating a train at an excessive speed and for failing to maintain an adequate warning device at the crossing where the accident occurred; the railroad contended that the FRSA preempted the claims because federal train-speed and grade-crossing regulations "cover[ed] the subject matter" of the state law. *Easterwood*, 507 U.S. at 661–63.

The Supreme Court ruled that the grade-crossing claim was *not* preempted, despite federal regulations on that topic. *Id*. at 670. Federal regulations required states receiving federal aid to develop a program to establish priorities for addressing "all manner of highway hazards" including grade crossings and annual reports to federal authorities. *Id*. at 665–66. However, these "general mandates" did not "cover the subject matter of the tort law of grade crossings" and hence did not preempt local claims. *Id*. at 668.

Other federal regulations prescribed that particular warning devices be installed for federally funded projects, and the means by which railroads are to participate in the selection of the devices. *Id*. at 671. Those regulations, said the Court, because they impose detailed substantive standards for the selection, approval, and installation of the warning devices, "displace" state decision-making authority and "cover the subject matter of state law"—tort claims based on unsafe crossings. *Id* at 670–71.

Similarly, detailed federal regulations "set maximum allowable operating speeds for all freight and passenger trains for each class of track on which they travel." *Id*. (*citing* 49 C.F.R. § 213.9(a)). Consequently, said the Court, those regulations "cove[r] the subject matter of train speed with respect to track conditions, including the conditions posed by grade crossings" and thus FRSA preempted the state excessive-speed claim. *Id*. at 675.

Likewise, in *Shanklin*, the Supreme Court determined that federal regulations "establish a standard of adequacy" regarding specific railroad safety devices and therefore preempted plaintiff's state-law tort action. 529 U.S. at 352.

Here, HM-232 prescribes no particular standards or means to achieve them, and sets no maximum or minimum criteria regarding the security of hazmat shipments, thus, it does not "establish a standard of adequacy" and hence does not preempt the Terrorism Prevention Act. HM-232 imposes *no* substantive standards at all, delegating the establishment of priorities and *all* security assessments and decisions to the railroads themselves in the first instance.[9]

Under the logic of both *Easterwood* and *Shanklin*, the FRSA does *not* preempt the Terrorism Prevention Act.

HM-232 is like the federal regulation found *not* to be preemptive in *Easterwood*, which directed States to establish priorities for addressing hazards. The federal government here has manifestly *not* established any specific "standard of adequacy" in HM-232 to safeguard hazardous-material shipping from terrorism, but has delegated to the railroads themselves in the first instance the responsibility to determine the extent of the threat and the specific measures (if any) to implement to attempt to lessen that threat. The United States has implicitly conceded that

[9] The United States asserted that the self-defined "performance standards" in that regulation were themselves "specific or minimum security measures." DCEx. 2 at 24.

"hazmat routing security" is not completely encompassed by HM-232, because *future* government actions will address that topic.

Discovery revealed that the federal government is actively planning to promulgate new regulations addressing the issue, which is an implicit admission that the sole current regulation on the topic, HM-232, does *not* currently cover the subject matter of "rail routing." *See Report on DOT Significant Rulemakings* (NPRM for a "Rail routing rule" scheduled for publication on December 26, 2006) (available at http://regs.dot.gov/rulemakings/200609/phmsa.htm?type=#82).

By imposing no substantive standards, deferring entirely to the railroads, and actively preparing future regulation on exactly that topic, HM-232 cannot therefore "cover the subject matter" of the Terrorism Prevention Act.

In *Union Pacific*, the Ninth Circuit held that a state railway-safety measure was *not* preempted by FRSA because of the failure of the FRA to promulgate substantive criteria for that particular aspect of railway safety. It explained: "Here, although the FRA may have had the same purpose in mind as [the non-federal entity], the FRA failed to 'cover' the actual subject matter: the FRA was aware that dangers existed, but it chose to test compliance rates rather than seek to mandate compliance with any particular rule. This is insufficient to preempt [the local] regulation." *Union Pacific*, 346 F.3d at 866 (*citing Easterwood*, 507 U.S. at 675). *Cf. Chapman v. Lab One*, 390 F.3d 620, 627 (8th Cir. 2004) (although "comprehensive regulations" promulgated under FRSA governed testing and laboratory procedures for controlled substances in transportation employees, the regulations did *not* preempt state common-law tort claims against the laboratories) (citing *Easterwood*).

Here, the single-page text of HM-232 cannot reasonably read to be comprehensive, but by its own terms, is merely the "first step" in a continuing effort to confront the threat of

terrorism in this context. *See* 68 Fed. Reg. at 14,511 (United States "is developing regulations that are likely to impose additional requirements beyond those established in this final rule.").

Here, DOT took a similar approach to that taken in *Union Pacific*—although it was *aware* of the risks of terrorist attacks, it chose to defer to the railroads themselves rather than mandate compliance with any substantive standard. As DOT expressly stated in adopting the final rule that became HM-232, it elected to adopt *non-substantive* standards, because to do otherwise would be too time-consuming in light of terrorism risks. *See* 68 Fed Reg. 14,511 ("We do not have the time to spend on development of a consensus standard for hazardous materials transportation security."). Thus, like the "compliance testing" implemented in *Union Pacific*, because HM-232 does not impose substantive standards on regulated entities, it does not preempt the Terrorism Prevention Act under the FRSA. *See also Tufariello v. Long Island Rail Road Co.*, 458 F.3d 80, 86 (2nd Cir. 2006) (FRSA does not preclude suit alleging failure to equip an employee with hearing protection, reversing trial court's conclusion that federal regulations establishing "minimum sound levels for warning devices on trains" "substantially subsumed" the subject matter); *Haynes v. Nat'l Railroad Passenger Corp.*, 423 F.Supp.2d 1073, 1082 (C.D. Cal. 2006) (while "[t]here are federal regulations addressing the subject matter of seats on passenger trains[,]" they do not "substantially subsume" state tort actions regarding potential "deep vein thrombosis" from poorly designed seats or seating arrangements, hence are *not* preempted by the FRSA). The court in *Haynes* found that the federal regulations prescribed standards regarding how seats must be fastened to car bodies, what types of load seats must be able to withstand, and "seat safety for circumstances involving train crashes and broken seats[,]" but they did not discuss the aspects of that generic topic encompassed by the state law, *i.e.*, "leg room, seat pitch, or ensuring that seats do not contribute to discomfort or illnesses like DVT." *Id*.

Similarly here, while HM-232 generally refers to the subject matter of "en route security" of trains carrying hazardous materials, it never addresses routing in that context, the single topic encompassed by the Terrorism Prevention Act. Further, the substance of the railroads' self-authored "security plans," no matter how detailed, is not the proper measure of preemption; the scope of preemption must be measured by the content of the federal regulations. *Union Pac.*, 346 F.3d at 867 n.19 ("Clearly, the FRA, not the Railroads, must 'cover' [the non-federal] regulations.") (*citing S. Pac. Transp. Co. v. Pub. Util. Comm'n*, 9 F.3d 807, 812 n.5 (9th Cir. 1993)).

The Ninth Circuit in *Union Pacific* also specifically rejected the railroads' claim, based on *Locke*, that because there is a "history of significant federal presence" in the area of railroad safety, there is no "presumption against preemption." *Union Pac.*, 346 F.3d at 864 n.17:

> Their argument is not convincing. First, the [Supreme] Court's "presumption against preemption" was a product of statutory interpretation. *Easterwood*, 507 U.S. at 664. Second, FRSA was only enacted in 1970. Prior to that time railroad safety was largely regulated by the states. This is much different from the maritime law at issue in *Locke*, which has been almost exclusively federally regulated since the Founding.

Id. (additional citations omitted). *Cf. Tyrrell*, 248 F.3d at 524 ("A debate over whether this type of railroad regulation is an historical function of the federal government or the States is unnecessary as the Supreme Court specifically held that a presumption against federal preemption is embodied in the saving clauses of [FRSA].") (*citing Easterwood*); *Iowa, Chicago & Eastern Railroad Corp. v. Washington County, Iowa*, 384 F.3d 557, 561 (8th Cir. 2004) ("Congress for many decades has forged a federal-state regulatory partnership to deal with problems of rail and highway safety . . . ."); *Florida East Coast Ry. Co. v. City of West Palm Beach*, 266 F.3d 1324, 1326 (11th Cir. 2001) (finding no preemption):

> Because the alleged encroachment upon federal jurisdiction here does not occur by the municipality's legislating in a field of historic federal presence, but through the exercise of its inherently local powers, "the principles of federalism and respect for state sovereignty that underlie the Court's reluctance to find pre-emption," *Cipollone v. Liggett Group, Inc*., 505 U.S. 504, 533 (1992) (Blackmun, J., concurring), place a "considerable burden" on [the railroad]. *De Buono v. NYSA-ILA Med. & Clinical Servs. Fund*, 520 U.S. 806, 814 (1997).

Id. at 1329 (parallel citations omitted). *But cf. CSX*, 406 F.3d at 673 ("the case for preemption is particularly strong where, as here, 'the State regulates in an area where there has been a history of significant federal presence.'") (*citing, inter alia, Locke*, 539 U.S. at 107).

HM-232 does not "cover" or "substantially subsume" the subject matter of the Terrorism Prevention Act, because it does not impose substantive requirements on shippers and carriers of hazardous materials, in contrast to DOT's maximum-speed regulation at issue in *Easterwood* and the specific safety-device standards implicated in *Shanklin*. *Cf. Medtronic, Inc.*, 518 U.S. at 501 (federal regulations will not preempt state law if the federal agency has not "weighed the competing interests relevant to the particular requirement in question, reached an unambiguous conclusion about how those competing considerations should be resolved in a particular case or set of cases, and implemented that conclusion via a specific mandate . . . ."); *Freightliner Corp. v. Myrick*, 514 U.S. 280, 289 (1995) (non-federal law not preempted because "there is simply no federal standard for a private party to comply with.").

Even leaving aside the post-9/11 amendments, the legislative history of FRSA supports this interpretation. *See* H.Rep. 91-1194, at __, *reprinted in* 1970 U.S.C.C.A.N. 4116 (a State may continue to regulate in an area of railroad safety until "the Secretary has prescribed a uniform national standard . . . .").

In light of the above, the Terrorism Prevention Act is not preempted by the FRSA.

B. *The Terrorism Prevention Act is Not Preempted by HMTA*.

Enacted in 1975, the HMTA, 49 U.S.C. §§ 5101–5127, establishes a scheme for the safe transportation of hazardous materials.

The HMTA's preemption provision, 49 U.S.C. § 5125, makes clear—and this Circuit has held—that Congress did not intend for the DOT to exclusively occupy the field, but rather to preserve a role for states, localities, and tribes in the regulation of hazardous materials transportation. *Massachusetts v. U.S. Dep't of Transp.*, 93 F.3d 890, 891–92 (D.C. Cir. 1996) ("Although HMTA . . . established some uniform standards in the interstate transportation of hazardous materials, the Act does not, by its terms, exclude all state participation in the regulation of hazardous waste being carried within that state's borders."). *See also N.H. Motor Transp. Ass'n v. Flynn*, 751 F.2d 43, 46 (1st Cir. 1984) (citing USDOT Inconsistency Ruling IR-3, 46 Fed. Reg. 18918, 18919 (1981)). As noted, the HMTA specifically defines the District as a State. 49 U.S.C. § 5102(11).

Rather than categorically preempt all state, local, and tribal hazmat requirements, § 5125 sets out three tests for determining whether such requirements are preempted. First, such regulations are preempted if they concern one of five "covered" subjects, and are not substantively the same as the federal requirement on that subject. Second, such regulations are preempted if it is impossible to comply simultaneously with the regulation and a federal requirement. *Id.* § 5125(a)(1).[10] Finally, such regulations are preempted if the state or local

[10] These subjects are: (1) the designation, description, and classification of hazardous material; (2) the packing, repacking, handling, labeling, marking, and placarding of hazardous material; (3) the preparation, execution, and use of shipping documents related to hazardous material and the requirements related to the number, contents, and placement of those documents; (4) the written notification, recording, and reporting of the unintentional release in transportation of hazardous material, and (5) the design, manufacturing, fabricating, marking, maintenance, reconditioning, repairing, or testing of a packaging or container represented,

requirement is "an obstacle to accomplishing and carrying out" federal hazardous materials law or regulations thereunder. *Id.* § 5125(a)(2).

This Circuit has held that preemption under the "obstacle" test requires that the challenged state, local, or tribal requirements "pose an obstacle to fulfilling explicit provisions, not general policies, of HMTA." *Massachusetts*, 93 F.3d at 895.

The Terrorism Prevention Act does not address a "covered" subject because it does not fall into a regulatory area reserved to the federal government. Hazmat routing in relation to terrorism is not one of the five "covered" subjects that § 5125(b)(1) of the HMTA explicitly reserves to the federal government.

Moreover, the Terrorism Prevention Act does not render it "impossible" to comply with federal requirements. No federal statute or regulation *requires* hazardous materials to be transported through the Capitol Exclusion Zone. It is therefore possible to comply simultaneously with the Bill and the requirements of federal law.

While the HMTA does in fact mention a desire that safety and security regulation for railroads be "nationally uniform to the extent practicable[,]" 49 U.S.C. § 20106, the *very next sentence* of that statute details how States (which includes the District) may enact their own laws and *avoid* federal preemption. *Cf. Holland v. Nat'l Mining Assn.*, 309 F.3d 808, 818 (D.C. Cir. 2002) (agency's preference for "uniform administration" of a statute may be wise, "but it is not the type of decision that deserves [*Chevron*] deference.") (citation omitted).

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marked, certified, or sold as qualified for use in transporting hazardous materials. 49 U.S.C. § 5125(b)(1).

C. *The Terrorism Prevention Act is Not Preempted by the ICCTA*.

Although CSXT did not move for summary judgment on its ICCTA claims, *see* P.Mem. at 2 n.1, that relief must be granted to the District here. The Circuit refused to address those claims, *see id.*, and CSXT has presented no evidence in support of this claim.

CSXT argues that the Terrorism Prevention Act is preempted by §10501(b) of the ICCTA, *codified as amended at* 49 U.S.C. §§ 701 *et seq*. (2005).

Federal preemption of state and local regulation over a railroad is limited to circumstances where state or local authorities attempt to use regulation as a means of foreclosing or unfairly restricting a railroad's ability to conduct its operations or otherwise unreasonably burdening interstate commerce. Accordingly, §10501(b) does not prohibit the District from exercising its police power to impose nondiscriminatory regulations to protect public health and safety. As in the case of the HMTA, the ICCTA explicitly defines the District as a State. 49 U.S.C. § 10102(8).

In *Florida East Coast Ry. Co. v. City of West Palm Beach*, 266 F.3d 1324 (11th Cir. 2001), the court noted the presumption against preemption recognized by the Supreme Court, and emphasized that the Senate Report on the final form of the bill that became the ICCTA stated that the exclusivity in the legislation "is limited to remedies with respect to rail regulation—not State and Federal law generally . . because they do not generally collide with the scheme of *economic regulation* (and deregulation) of rail transportation," thus identifying a clear limit on the use of the exemption provided in the ICCTA. *Id*. at 1338 (emphasis added). Here, as noted, the issue is not the "economic regulation" of CSXT, but the safety of hundreds of thousands of the District's residents and visitors.

The ICCTA was passed, *inter alia*, to continue the deregulation of the railroad industry. *See, e.g., Iowa, Chicago & Eastern Railroad Corp. v. Washington County, Iowa*, 384 F.3d 557, 558–59 (8th Cir. 2004) (ICCTA repealed much of the "economic regulation" previously conducted by the Interstate Commerce Commission). Preemption was not the primary concern of the federal law. "The statutory changes brought about by the ICCTA reflect the focus of legislative attention on removing direct economic regulation by the States, as opposed to the incidental effects that inhere in the exercise of traditionally local police powers . . . ." *Florida East Coast*, 266 F.3d at 1337.

Here, the Terrorism Prevention Act does not deny CSXT or anyone else the right to conduct operations. CSXT has not alleged, much less demonstrated, that it is *incapable* of complying with that law; it simply would prefer to avoid the administrative burdens and costs of compliance. The burden of proof under federal preemption is not so lax, however.

ICCTA preemption is *not* intended to interfere with the non-discriminatory exercise of state police powers that are essential for the protection of public health and safety. *See Iowa, Chicago & Eastern*, 384 F.3d at 561 (ICCTA does not preempt state safety regulation setting standards for bridge safety). "Congress for many decades has forged a federal-state regulatory partnership to deal with problems of rail and highway safety . . . . ICCTA did not address these problems. Its silence cannot reflect the requisite "clear and manifest purpose of Congress" to preempt traditional state regulation . . . ." *Id.*[11]

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[11] *Cf. Florida East Coast*, 266 F.3d at 1326 (city's zoning and licensing ordinances not preempted by ICCTA):

> Because the alleged encroachment upon federal jurisdiction here does not occur by the municipality's legislating in a field of historic federal presence, but through the exercise of its inherently local powers, "the principles of federalism and respect for state sovereignty that underlie the Court's reluctance to find pre-

The concerns of the District addressed in the Terrorism Prevention Act are not economic in nature, but crucial to its citizens' safety and security. In light of the above, the ICCTA does not preempt the District's law, and summary judgment on that claim must be granted to the District.

D. *The Terrorism Prevention Act Does Not Violate the Commerce Clause*.

Rather than repeat some arguments, the District incorporates here by reference the relevant portion of its Opposition to Plaintiff's Motion for Summary Judgment. CSXT has failed to introduce any new evidence to support its claims, relying solely on the implications of the Circuit's ruling.

CSXT's Commerce Clause claim—that the Terrorism Prevention Act is "local protectionist legislation" that impermissibly shifts risk to "other jurisdictions" fails. First Amended Complaint ¶¶ 92, 94.

In the typical case in which local laws have been struck down as violating the Commerce Clause, the law is usually a protectionist measure designed to insulate local industry from out-of-state competition. *See, e.g., Oregon Waste Sys., Inc. v. Dept. of Environmental Quality*, 511 U.S. 93 (1994) (state law imposed higher disposal fee on out-of-state waste).

The Terrorism Protection Act is clearly not, by its terms, simple economic protectionism. CSXT cannot seriously contend that the legislation favors intra-District economic interests over out-of-state ones; neither the *source* nor the *destination* of the materials shipped here are

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> emption," *Cipollone v. Liggett Group, Inc*., 505 U.S. 504, 533 (1992) (Blackmun, J., concurring), place a "considerable burden" on [the railroad]. *De Buono v. NYSA-ILA Med. & Clinical Servs. Fund*, 520 U.S. 806, 814 (1997).

Id. at 1329 (parallel citations omitted).

implicated by the law—it makes no differentiation between interstate and intra-District commerce in terms of origin or ultimate destination of the hazardous materials, or for any other reason. *See American Trucking Ass'ns Inc. v. Michigan Public Serv. Comm'n*, 545 U.S. 429, 434 (2005) (upholding annual state commercial-hauling truck fee; state regulates only "activities taking place exclusively within the State's borders. [The law] does not facially discriminate against interstate or out-of-state activities or enterprises. The statute applies evenhandedly to all carriers that make domestic journeys.").

So too here. The Terrorism Prevention Act regulates only activities taking place exclusively within the District's borders; it does not facially discriminate against interstate or out-of-state activities or enterprises, and it applies evenhandedly to all carriers. The District law has one and only one purpose—to protect the citizens of the District from the risk of terrorist attack; any "burdens" CSXT may complain of are no more than incidental.

The Supreme Court has noted that "incidental burdens on interstate commerce may be unavoidable when a State legislates to safeguard the health and safety of its people." *City of Phila. v. New Jersey*, 437 U.S. 617, 623–24 (1978). *See also Osborn v. Ozlin*, 310 U.S. 53, 62 (1940) ("[t]he mere fact that state action may have repercussions beyond state lines is of no judicial significance so long as the action is not within that domain which the Constitution forbids."). *Cf. Maine v. Taylor*, 477 U.S. 131, 138 (1986) ("the States retain authority under their general police powers to regulate matters of legitimate local concern, even though interstate commerce may be affected.").

State laws, like the Terrorism Prevention Act, that purport to regulate "the health, life, and safety" of its citizens are entitled to special deference in Commerce Clause analysis. *Head v. New Mexico Bd. of Examiners in Optometry*, 374 U.S. 424, 428 (1963). *See also American*

Trucking, 545 U.S. at 434 (Constitution does not "displace[] States' authority 'to shelter [their] people from menaces to their health or safety . . . .") (quoting *D.H. Holmes Co. v. McNamara*, 486 U.S. 24, 29 (1988)); *Gen'l Motors Corp. v. Tracy*, 519 U.S. 278, 306 (1997) (Commerce Clause was "never intended to cut the States off from legislating on all subjects relating to the health, life, and safety of their citizens, though the legislation might indirectly affect the commerce of the country.") (*quoting Huron Portland Cement Co. v. Detroit*, 362 U.S. 440, 443–44 (1960) (additional citations omitted)); *Electrolert Corp. v. Barry*, 737 F.2d 110, 113 (D.C. Cir. 1984).

Although CSXT's allegations regarding its bottom line are little more than speculation, "the fact that a law may have 'devastating economic consequences' on a particular interstate firm is not sufficient to rise to a Commerce Clause burden." *Pharmaceutical Research & Manufacturers of Am. v. Concannon*, 249 F.3d 66, 84 (1st Cir. 2001) (citation omitted), *affirmed sub nom.*, *Pharmaceutical Research & Manufacturers of Am. v. Walsh* 538 U.S. 644, 669–70 (2003). *See also Exxon Corp.*, 437 U.S. at 127–28 (Commerce Clause "protects the interstate market, not particular interstate firms, from prohibitive or burdensome regulations."). *See also District of Columbia v. Beretta USA Corp.*, 872 A.2d 633, 658 (D.C. 2004) (*en banc*):

> Differences in the conditions and risks of doing business from state to state are in part the inevitable result of *any* state economic regulation, but the effects that these differences have on commercial decisions, even those that involve interstate trade, are not by themselves nearly so direct as to 'affect commerce' in the constitutional sense.

Id. (*quoting Bowman v. Niagara Mach. & Tool Works, Inc*., 832 F.2d 1052, 1056 (7th Cir.1987) (emphasis in original)).

The Second Circuit, over 20 years ago, upheld New York City's regulations requiring the rerouting of hazardous-gas trucks around the city "if no practical alternative route" exists, noting

"[t]he New York regulations plainly do not have local economic protectionism as their objective; [they] are directed at a legitimate local concern for public safety . . . . They apply even-handedly both to intrastate and interstate commerce in hazardous gases." *Nat'l Tank Truck Carriers, Inc. v. City of New York*, 677 F.2d 270, 271–273 (2nd Cir. 1982).

The Terrorism Prevention Act compares favorably to the New York City regulations. CSXT argued that the Commerce Clause will protect States "from efforts by one State to isolate itself in the stream of interstate commerce from a problem shared by all." PI Memo at 22 (*quoting City of Phila.*, 437 U.S. at 629). The District asserts that the "problem" here—the risk of terrorist attack—is most assuredly *not* "shared by all;" it falls uniquely on the District, to the exclusion of the surrounding region, and to the exclusion of any other jurisdictions through which plaintiff's lines may pass, with the possible exception of New York City.

Thus, if a local law is not simple economic protectionism, courts use the balancing test of *Pike v. Bruce Church*, 397 U.S. 137, 142 (1970), to analyze the law. If a statute regulates *evenhandedly* and has only *incidental effects* on interstate commerce, a court must balance the alleged *burden* on interstate commerce against the putative local *benefit*. *Id*. at 142 (citations omitted) ("the extent of the burden that will be tolerated will of course depend on the nature of the local interest involved").

"[S]tate safety regulations are accorded particular deference in Commerce Clause analysis." *Electrolert Corp. v. Barry*, 737 F.2d 110, 113 (D.C. Cir. 1984) (*citing South Carolina State Highway Dep't v. Barnwell Bros., Inc*., 303 U.S. 177, 189 (1938) and *Raymond Motor Transportation, Inc. v. Rice*, 434 U.S. 429, 443 (1978)).[12]

[12] In *Electrolert*, the D.C. Circuit upheld a District-wide ban on the possession or use of radar detectors, rejecting a manufacturer's Commerce Clause arguments.

Here, the legislation will have undeniable security and safety benefits. In such circumstances, further Commerce Clause analysis is unnecessary:

> [F]ive Justices have recently agreed that statutes based on nonillusory safety benefits are not subject to the dormant Commerce Clause balancing test. See [*Kassel v. Consolidated Freightways Corp.*, 450 U.S. 662, 681 n.1 (1981)] (Brennan, J., joined by Marshall, J., concurring in the judgment) ("in the field of safety . . . the role of the courts is not to balance asserted burdens against intended benefits," but rather "once the court has established that the intended safety benefit is not illusory, insubstantial, or nonexistent, it must defer to the State's lawmakers on the appropriate balance to be struck against other interests"); *id*. at 692 n. 4 (Rehnquist, J., joined by Burger C.J., and Stewart, J., dissenting) ("courts in Commerce Clause cases do not sit to weigh safety benefits against burdens on commerce when the safety benefits are not illusory"); see also *id*. at 670 (opinion of Powell, J.) (noting "strong presumption of validity" that attaches to safety regulations).

Electrolert Corp., 737 F.2d at 113.

The benefits of the law here are clearly "not illusory," and therefore the legislation should not be subjected even to the *Pike* balancing test. *Id*. ("In these circumstances we need not perform any fine balancing tests or inquire closely into the validity of the local government's reasonable factual assumption. Having satisfied ourselves that the local government's safety rationale is not "illusory" or "nonexistent," our inquiry is at an end."). *See also Nat'l Tank Truck*, 677 F.2d at 273 ("Cases striking down nondiscriminatory state safety regulations for disproportionate burdens on interstate commerce are exceptional.").

The benefits of the law could hardly be clearer—it protects the most attractive target for terrorist attacks in the country. The minimal added cost and delay associated with routing around the Capitol Exclusion Zone is not disproportionate when balanced against the tremendous gains in public safety achieved by avoiding a potentially catastrophic terrorist attack in a densely populated area that has already been, and continues to be, a high-risk terrorist target. *See Nat'l Tank Truck*, 677 F.2d at 274 (costs and delay of rerouting tank truck shipments of hazardous gas

around New York City "not unconstitutionally disproportionate when balanced against the public interest in avoiding a catastrophic accident in a densely populated urban area").

> In sum, the burden of the [local regulation] on interstate commerce has not been shown to be excessive in relation to the benefits. Congress has great latitude to order preemption, and calibrate it with precision, based on a legislative judgment that local regulation threatens interstate commerce. The dormant Commerce Clause, by contrast, is a fairly blunt instrument; and absent discrimination, courts may reasonably insist on a fairly clear showing of undue burden before holding unconstitutional a traditional example of local regulation.

New Hampshire Motor Transport Assn. v. Plaistow, 67 F.3d 326, 333 (1st Cir. 1995), *cert. denied* 517 U.S. 1120 (1996).

Neither CSXT nor the United States added any evidence to the current record regarding the "burden" on interstate commerce. The Terrorism Prevention Act does not have an impermissible burden on interstate commerce. Summary judgment on CSXT's Commerce Clause claim must be granted to the District.

E. *The Terrorism Prevention Act Does Not Violate the Home Rule Act*.

Although CSXT did not move for summary judgment on its Home Rule Act claims, that relief must be granted to the District here.

CSXT makes the essentially throw-away argument that the Terrorism Prevention Act was enacted in violation of the Home Rule Act, because it purportedly "applies to conduct beyond the boundaries of the District," and because there was "no true emergency" motivating the Council. First Amended Complaint ¶¶ 131–135 (*citing* the Home Rule Act, *codified as amended at* D.C. Official Code §§ 1-201.01 *et seq.* (2001 ed.)).

While it is true generally that the terms of the Home Rule Act limit the Council from enacting legislation that is "not restricted in its application exclusively in or to the District," D.C. Official Code § 1-206.02(3), the Terrorism Prevention Act does not, by its explicit terms, operate

outside the District. Thus, plaintiff's Commerce Clause claim entirely subsumes the first part of its Home Rule Act claim, and is effectively refuted by the District *supra* and in its Opposition.

The Terrorism Prevention Act was initially passed as emergency legislation, effective for only 90 days. As such, it need not be presented to Congress for review. *Id*. at § 1-206.02(c)(1); *Bliley v. Kelly*, 23 F.3d 507, 509 (D.C. Cir. 1994).

The District of Columbia Court of Appeals has noted that "[t]he Council considers a situation to be an emergency when immediate legislative action is required for '[the] preservation of the public peace, health, safety and general welfare.'" *District of Columbia v. Washington Home Ownership Council, Inc.*, 415 A.2d 1349, 1352 (D.C. 1980) (*en banc*). In that case, the court specifically noted that it did not reach the question of whether local courts were authorized to review the validity of the Council's determination that an emergency exists. *Id*. at 1353 n.11. *Cf. Atchison v. Barry*, 585 A.2d 150, 157 (D.C. 1991) (Council's determination of emergency is entitled to "substantial deference"). As the D.C. Court of Appeals has indicated, "the test is whether the factual situation is such that there is actually a crisis or emergency which requires immediate or quick legislative action for the preservation of the public peace, property, health, safety or morals." *Id*. (*citing AFGE v. Barry*, 459 A.2d 1045, 1050 n.9 (D.C. 1983)).

Because the record amply demonstrates the continuing nature of the terrorism threat in the District, the Court should defer to the Council's determination that an emergency existed requiring immediate action to protect public safety. *See Tenley & Cleveland Park Emergency Committee v. District of Columbia Bd. of Zoning Adjustment*, 550 A.2d 331, 334 n.10 (D.C. 1988) (the Council's interpretation of its responsibilities under the Home Rule Act is entitled to "great deference.").

Summary judgment on CSXT's Home Rule Act claims must be granted to the District.

III. Conclusion

For the foregoing reasons, those in the District's contemporaneous Opposition, and generally in the Sierra Club's brief, summary judgment should be entered in defendants' favor on all counts of the Second Supplemental Complaint. A proposed Order is attached hereto.

DATE: October 27, 2006

Respectfully submitted,

ROBERT J. SPAGNOLETTI
Attorney General, D.C.

GEORGE C. VALENTINE
Deputy Attorney General, D.C.
Civil Litigation Division

/s/ Richard S. Love
RICHARD S. LOVE, D.C. Bar No. 340455
Chief, Equity I
441 Fourth Street, N.W., 6th Floor South
Washington, D.C. 20001
Telephone: (202) 724-6635
Facsimile: (202) 727-0431

/s/ Robert Utiger
ROBERT UTIGER, D.C. Bar No. 437130
Senior Assistant Attorney General
Civil Litigation Division
Office of the Attorney General for the District of Columbia
441 Fourth Street, N.W., 6th Floor South
Washington, D.C. 20001
Telephone: (202) 724-6532
Facsimile: (202) 727-3625

/s/ Andrew J. Saindon
ANDREW J. SAINDON, D.C. Bar No. 456987
Assistant Attorney General
Equity 1
441 Fourth Street, N.W., 6th Floor South
Washington, D.C. 20001
Telephone: (202) 724-6643
Facsimile: (202) 727-0431
andy.saindon@dc.gov